



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

July 27, 2021 Government Records Council Meeting

Benjamin Palombi
Complainant

Complaint No. 2019-122

v.

NJ Department of Labor and Workforce
Development
Custodian of Record

At the July 27, 2021 public meeting, the Government Records Council ("Council") considered the July 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint; to wit, e-mails, text messages from cell phones subsidized by the state, and memos regarding D Palombi, Deborah Palombi, Deb Palombi, Debbie Palombi, "Deb" between July 2018 and April 29, 2019 to/from/between Tennille McCoy Suzan Nickelson, Suzan Cohen Nickelson, Rose Ward, Gary Karr, Joseph Kitchell, Justin Wiggins, to determine the validity of the Custodian's assertion that the records were lawfully denied as personnel records, and/or records implicating privacy concerns, and/or records constituting advisory, consultative, or deliberative material.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see paragraph 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² **The document or redaction index must clearly identify each separate responsive record by sequential number and general description, and assert the lawful basis for each denial, or part thereof. If more than one reason is asserted for denying access, each reason must be set forth in detail.**

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 27th Day of July 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2021 Council Meeting**

**Benjamin Palombi¹
Complainant**

GRC Complaint No. 2019-122

v.

**New Jersey Department of Labor
and Workforce Development²
Custodial Agency**

Records Relevant to Complaint: Copies via e-mail of “[e]mail communications; [t]ext messages (from any cell phone subsidized by the state); [m]emos regarding D Palombi; Deborah Palombi; Deb Palombi; Debbie Palombi; “Deb” between July 2018 and April 29, 2019 to/from/between the following individuals: Tennille McCoy Suzan Nickelson/Suzan Cohen Nickelson Rose Ward Gary Karr Joseph Kitchell Justin Wiggins.”

Custodian of Record: David Fish

Request Received by Custodian: June 5, 2019

Responses Made by Custodian: June 12, 2019 and June 28, 2019

GRC Complaint Received: July 1, 2019

Background³

Request and Responses:

On June 5, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 12, 2019, the fifth (5th) business day following receipt of said request, the Custodian responded in writing confirming an agreed-upon extension of time until June 28, 2019, for the Custodian to respond to the request. On June 28, 2019, the Custodian responded to the request informing the Complainant that the agency is unable to search the body of text messages. The Custodian also informed the Complainant that the requested records are exempt from disclosure as personnel or pension records pursuant to N.J.S.A. 47:1A-10.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Sean P. Havern.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Denial of Access Complaint:

On July 1, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted an OPRA request for above-mentioned records on June 5, 2019. The Complainant stated that the parties agreed to an extension of time until June 28, 2019, for the Custodian to gather information and respond to the request. The Complainant further stated that the Custodian acted in bad faith because he waited until the close of business on June 28, 2019 to respond, and then falsely denied the Complainant’s request citing N.J.S.A. 47:1A-10.

Statement of Information:

On July 23, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on June 5, 2019, and responded in writing on June 12, 2019, confirming a mutually agreed extension of time until June 28, 2019. The Custodian certified that there are 116 pages of records responsive to the Complainant’s request, all of which were denied in their entirety on June 28, 2019, because they are exempt from access as personnel or pension records pursuant to N.J.S.A. 47:1A-10.

The Custodian’s Counsel argued that the Custodian properly withheld from disclosure the requested records in their entirety because they are personnel records, which are not government records subject to disclosure under N.J.S.A. 47:1A-10. The Custodian’s Counsel stated that the only exception is for the individual’s name, title, position, salary, payroll record, length of service, date of and reason for separation, and amount and type of any pension. The Custodian’s Counsel stated that the Complainant did not request such discrete information.

Counsel stated that the Complainant’s request sought all communications concerning Deborah Palombi created by certain human resources staff members and her supervisors. Counsel argued that the Complainant is clearly seeking personnel records that are categorically not governmental records disclosable to the general public. The Custodian’s Counsel asserted that the request here is analogous to the request made in McGee v. Twp. of E. Amwell, 416 N.J. Super. 602 (App. Div. 2010), where the requestor sought communications between and among various members of the municipality. The Custodian’s Counsel stated that the Appellate Division determined that the requested communications implicated important privacy concerns and contained advisory, consultative, or deliberative (“ACD”) material. Counsel stated that the Complainant failed to provide any evidence that Ms. Palombi waived her privacy rights that the personnel records provision protects. The Custodian’s Counsel argued that for the aforementioned reasons, the Custodian properly denied the Complainant’s request.

The Custodian’s Counsel also argued that it is unnecessary for the Council to conduct an *in camera* examination of the requested records. Counsel argued that the requested records are categorically not government records subject to disclosure; therefore, an *in camera* review is not needed to determine which documents, if any, may be disclosed.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian denied all of the responsive records, which he certified contained 116 pages, as personnel records exempt from access pursuant to N.J.S.A. 47:1A-10. The Custodian’s Counsel supported the Custodian’s assertion that the requested records were exempt from disclosure in their entirety as personnel records under N.J.S.A. 47:1A-10; however, Counsel also stated that the request forming the basis of the instant complaint is analogous to the request made in McGee, 416 N.J. Super. 602, wherein the court found the request implicated privacy concerns and also contained ACD material. Per N.J.S.A. 47:1A-1.1, ACD documents are not government records subject to disclosure.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ dismissing the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to

⁴ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the records relevant to this complaint; to wit, e-mails, text messages from cell phones subsidized by the state, and memos regarding D Palombi, Deborah Palombi, Deb Palombi, Debbie Palombi, “Deb” between July 2018 and April 29, 2019 to/from/between Tennille McCoy Suzan Nickelson, Suzan Cohen Nickelson, Rose Ward, Gary Karr, Joseph Kitchell, Justin Wiggins, to determine the validity of the Custodian’s assertion that the records were lawfully denied as personnel records, and/or records implicating privacy concerns, and/or records constituting ACD material.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the records relevant to this complaint; to wit, e-mails, text messages from cell phones subsidized by the state, and memos regarding D Palombi, Deborah Palombi, Deb Palombi, Debbie Palombi, “Deb” between July 2018 and April 29, 2019 to/from/between Tennille McCoy Suzan Nickelson, Suzan Cohen Nickelson, Rose Ward, Gary Karr, Joseph Kitchell, Justin Wiggins, to determine the validity of the Custodian’s assertion that the records were lawfully denied as personnel records, and/or records implicating privacy concerns, and/or records constituting advisory, consultative, or deliberative material.
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⁶ ***The document or redaction index must clearly identify each separate responsive record by sequential number and general description, and assert the lawful basis for each denial, or part thereof. If more than one reason is asserted for denying access, each reason must be set forth in detail.***

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records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Staff Attorney

July 20, 2021